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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 281

WILLIAM H. KENNER, ESTATE OF ELEANOR V. KENNER, Deceased, and KENNER'S CHARITABLE HOSPITAL, INC. a not-for-profit, Illinois corporation, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ESTATE OF ELEANOR V. KENNER, Deceased
By: WILLIAM H. KENNER

KENNER'S CHARITABLE HOSPITAL, INC.
a not-for-profit, Illinois corporation
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COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

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Petitioners, William H. Kenner, Estate of Eleanor V. Kenner, deceased, and Kenner's Charitable Hospital, Inc., a not-for-profit, Illinois corporation, pray for a writ of certiorari to review the decision of the United States Court of Appeals For The Seventh Circuit, entered in the above entitled case on January 5, 1968.

CITATIONS TO OPINIONS BELOW

No opinion was rendered in the Tax Court, Judge Withey merely "lodged" with the Tax Court "Petition For Court To Request U. S. Attorney General To Investigate Fraud Upon The Court".

The opinion of the United States Court Of Appeals For The Seventh Circuit was reported at 387 F. 2d 689 (1968), and is printed in Appendix (1a).

The opinion in prior Tax Court case is reported as *Kenner* v. *Commissioner of Internal Revenue,* 318 F. 2d 632 (1963) and is printed in Appendix (p. 7a).

JURISDICTION

The judgment of the United States Court Of Appeals For The Seventh Circuit was entered on January 5, 1968 (App. p. 1a) 387 F. 2d 689. A timely "Petition For Rehearing", a printed copy of which is in the record here, was denied on February 14, 1968 (App. p. 7a).

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

An order extending the time to file petition for writ of certiorari to July 13, 1968, was entered by this Court on May 2, 1968.

ISSUES PRESENTED

The principal substantial issue of continuing importance by this case is whether the Internal Revenue Laws may, consistent with the Fourteenth Amendment to the Constitution of the United States, be used in a corrupt shakedown conspiracy and if so, whether the refusal to pay a $60,000 extortion demand can take the form of a confiscation of a two million dollar not-for-profit Hospital, real estate and cash.

Also presented is the question whether the "Petition For Court To Request U. S. Attorney General To Investigate Fraud Upon The Court", alleged fraud with sufficient particularity, and if not, should leave have been granted to amend, instead of dismissing it.

STATUTE INVOLVED

The issues involve the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

Section 1 of Amendment Fourteen, reads:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The issues also involve Rule 9(b) of 28 USC Rules of Civil Procedure, which reads:

> Rule 9. Pleading Special Matters
>
> (b) Fraud, Mistake, Condition of Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

STATEMENT

1. Importance of the Case

This matter is of great moment to the public.

This matter does not only shock, devastate and concern the immediate petitioners. There are issues of great moment to the public. Furthermore, tampering with the administration of justice in the manner shown here involves far more than an injury to a single

litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

The meaning of this case cannot be mistaken. The sense of mankind is against extortion and fraud practiced on judicial institutions. Every stage of this long, excruciating death-dealing process makes it clear that here the Court is confronted with one of the great and signal cases of court room injustice in American legal history.

This case cries out for review by this Court to the end that other individuals and Hospitals will not be subjected to bludgeons of extortion and endless years of predatory litigation as petitioners have suffered here.

The disposition now to be made of this case admits of no doubt. The records of the courts must be purged and the judgments in respondent's favor, both in the U. S. Court of Appeals and the Tax Court must be vacated and the suits by respondent must be finally dismissed. No principle is better settled than the maxim that he who comes into equity must come with clean hands and keep them clean throughout the course of the litigation, and that if he violates this rule, he must be denied all relief whatever may have been the merits of his claim. *Hazel-Atlas Glass Co.* v. *Hartford*

Empire Co. (1944), 322 U.S. 238, 250, 64 S. Ct. 997, 88 L. ed. 1250; *Root Refining Co.* v. *Universal Oil Products Co.* (CCA 3d, 1948) 169 F. 2d 514, 534-535.

2. Nature of the Case

This petition for certiorari is petitioners' last resort in their quest during many years for a remedy of their substantial Federal rights under the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution.

Here are questions of importance to the due administration of justice throughout the United States.

The decisions below have left petitioners helplessly enmeshed in many years of unrelenting campaign of legal harassment, oppression and devastation, as a result of a corrupt conspiracy to extort $60,000 from petitioners. Because petitioners refused to pay $60,000 extortion demand, all of petitioners' assets of over $2,000,000 were summarily confiscated and the tax-exempt status of Kenner's Charitable Hospital, Inc., a not-for-profit Illinois corporation, was revoked, forcing the Hospital to close.

A "Petition For Court To Request U. S. Attorney General To Investigate Fraud Upon The Court" was filed in the Tax Court, on September 12, 1966 (see printed "Brief and Appendix of Appellants", App., p. 3, which is part of the record herein). The Tax Court merely "lodged" the petition stating that it had "no jurisdiction to act upon it". On September 22, 1966, petitioners filed an appeal in the U.S. Court of Appeals where it was held that the Tax Court did have juricdiction to act on the petition, but at the same time

it held that the petition "fails to allege fraud upon the tax court with sufficient particularity (App. p. 1a).

Despite the fact that the Tax Court had not acted on the petition, except to "lodge" it, the Court of Appeals decided as follows:

> "The tax court's dismissal of the petition is Affirmed."

Petitioners, in their petition offered to prove specific facts which would plainly impugn the official record and they did show with particularity an unconscionable scheme designed to improperly influence the court in its decision, but the Court of Appeals held that "* * * the present petition lacks sufficient substance".

The conspirators had a hammer-lock on petitioners until about one year ago when petitioners managed to extricate themselves from that formidable control and immediately they filed in the Tax Court their "Petition For Court To Request U. S. Attorney General To Investigate Fraud Upon The Court". The conspiracy was especially vicious since it influenced and controlled petitioners' attorneys, one of which was John Potts Barnes, who at first represented to respondent and assured petitioners that no tax was owed, then later when he became part of the conspiracy and was rewarded by respondent, on June, 1955, with the position of Chief Counsel for the Internal Revenue Service he reversed himself. He remained as Chief Counsel until January 1957. In March 1956, in the middle of his tenure with the IRS, he demanded a "fee" from petitioners of about $5,200 for service up to that time, which he was paid, but petitioners at this point were not aware of Barnes' complicity in the conspiracy and that he was busy processing the tax case against them resulting

in the confiscation of all of petitioners' assets, including $78,000 cash in the bank and $2,000,000 worth of real estate leaving petitioners only debts. They picked petitioners clean and put them on their feet—bare-feet and of course left them with all of the debts. Apparently this was not yet enough because on May 21, 1965, they signed an "AGREED ORDER" for $447,985.38, without the knowledge or consent of petitioners which they now claim was a mistake, that it should have been $705,126.88! See *United States of America* v. *William H. Kenner, et al.,* United States District Court, Northern District of Illinois, Eastern Division, suit commenced in February, 1968, No. 62 C 1049. Petitioners have made repeated requests for an accounting of the unlawful confiscations of assets without success.

It is difficult to conceive a vicious extortion scheme more calculated to bind, suppress, financially and indeed physically destroy petitioners than the one which has been used and is in force against them.

SUMMARY OF ARGUMENT

This case is a brazen, unconscionable conspiracy to extort $60,000 from petitioners. Because the shakedown was unsuccessful, petitioners were relieved of all of their assets worth over $2,000,000, Kenner's Charitable Hospital, Inc., a not-for-profit Illinois corporation was forced to close, and the unbearable situation caused the untimely death of petitioner, Eleanor V. Kenner—an unconstitutional attempt under the guise of the Internal Revenue laws to confiscate property.

Such unscrupulous and ruthless misuse of judicial process has denied petitioners due process and equal protection of law under the Fourteenth Amendment.

Petitioners sufficiently particularized their allegations of fraud practiced on the court in the petition, and in holding that such was not the case, leave should have been granted to amend, but in no event should it have been dismissed, in the interest of substantial justice.

ARGUMENT

POINT I

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN CONFLICT WITH THE DECISIONS OF THIS COURT AND HAS SO FAR DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL PROCEDURE AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF REVIEW.

1. The Bludgeoning of Petitioners

This is not a case of using the Federal courts and the judicial process to collect tax actually owed, but as an instrument to bludgeon petitioners out of $2,000,000 because they would not pay a $60,000 extortion demand.

The Court of Appeals (1a) ignored the serious $60,000 shakedown incident by touching it much too lightly, as follows:

> "One agent, according to Dr. Kenner, solicited a bribe, although later investigation was said to clear the agent".

The agent was never cleared by an independent government agency. According to information which has reached petitioner, the agent was penalized for bungling the extortion attempt. The detail of respondent's own investigation is a secret in his exclusive, hostile control.

Petitioners have made demands for specifics about this incident but it remains a deep dark secret. To

protect such wrongdoing is obnoxious to the public policy of this jurisdiction.

Such misuse of judicial process is contra to due process and equal protection of the law under the Fourteenth Amendment.

2. Death and Destruction of Petitioners

George Templer who demanded the $60,000 shakedown, John Potts Barnes who was Chief Counsel for both petitioners and respondent at the same time, together with the abnegation of the Judges of their judicial functions, have put Kenner's Charitable Hospital, a not-for-profit Illinois corporation out of business; the second petitioner, Eleanor V. Kenner, could not stand up under the strain of many years of unconscionable harassment, she died; and the lone surviving petitioner, Dr. William H. Kenner, has been rendered sick and aged—all of which does violence to due process and equal protection of the law, and is a reflection on the bench and bar.

3. Sinister Machinations of Corrupt Officials Is "Standard Practice" According to Respondent

This case is so shocking and appalling, it cannot be overstated.

In "Brief For The Respondent," p. 29, filed June 5, 1967, in the Court of Appeals, respondent states that " * * * the specific acts of fraud relied upon by petitioners * * * sinister machinations of corrupt officials turn out, upon examination, to be standard practice".

Upon reading this admission, petitioners were at first nonplused and shocked. They were under the erroneous impression, in their naive belief, that theirs was one of only a few cases of fraud practiced on the court by respondent but, "upon examination", are inclined

to be compelled to broaden and rectify their thinking and realize that it is, in truth and fact, "standard practice", since then their "examination" revealed the following "standard practice", as set out in petitioners' printed "Petition for Rehearing", filed on January 19, 1968, in Court of Appeals, pp. 12-14, which is part of the record here. Taking into account the public utterances of outraged responsible government officials, who are quoted below, of which the Court will take judicial notice:

> "27. The Court will take judicial notice that Sen. Warren Magnuson (D., Wash.) declared:
>
> 'Too many Americans pay more than their share of taxes, because they are intimidated by a tax-collecting octopus which has them at a disadvantage and keeps them that way.'
>
> 28. The Court will take judicial notice that more than half the Senate membership has gone on record as calling for something to be done about the way small taxpayers are abused by IRS.
>
> 29. The Court will take judicial notice that Sen. Norris Cotton (R., N.H.) said:
>
> 'My files, like those of every other senator, are filled with moving appeals from taxpayers whose experience with IRS have turned into nightmares of inquisition.'
>
> 30. The Court will take judicial notice that alarmed by multiplying complaints, the Senate Judiciary Subcommittee on Administrative Practice and Procedure, Room 3214, New Senate Office Bldg., Wash., D. C. 20510, two years ago began asking IRS officials and their victims questions under oath; that the ensuing hearings produced astounding testimony disclosing that: IRS has defied court orders, criminally picked locks, stolen records and threatened reputable people.
>
> 31. The Court will take judicial notice that Sen. Edward V. Long (D., Mo.) chairman of the Senate

subcommittee probing into IRS practices, declared:

'IRS has become morally corrupted * * * it acts like a Gestapo preying upon defenseless citizens.'

32. The Court will take judicial notice that Senate Majority Leader Everett Dirksen, a subcommittee member, reported:

'Outraged constituents have inundated my desk with letters blistering the Revenue Service collection practices * * *'"

33. The Court will take judicial notice that the Federal District Court in Boston declared that IRS's 'unlawful pressures' against Donald R. Lord of Dedham, Mass., 31-year-old accountant, came 'close to extortion'; that it ruled the seizure of the business records completely illegal, and forbade IRS to make any further use of them; that yet, as a distinguished Boston lawyer, Lawrence O'Donnell subsequently proved with testimony of one agent who resigned in disgust, IRS made copies of these records and continued to use them—in arrogant contempt of the court order.

34. The Court will take judicial notice that Sen. John J. Williams (R., Del.) has unveiled on the floor of the Senate undisputed evidence of a double standard, which shows that while mercilessly trying to take the last cent of some taxpayers, IRS has treated others quite differently; that over a period of seven years, IRS allowed the New York-based real estate firm of Webb & Knapp to pile up tax debts of more than $27 million, while the Federal Housing Administration lavished on it $67 million in government-insured loans; that Webb & Knapp defaulted on the loans, and IRS in December 1965 wrote off a whopping $26 million as 'uncollectible'; that similarly, IRS last year simply wrote off as 'uncollectible' a tax bill of more than $23 million owed by six American shipping com-

panies controlled by Greek magnate Stavros Niarchos."

All of the foregoing practices of respondent are in violation of the due process and equal protection clauses of the Fourteenth Amendment.

4. Existing Judgments Encourage a Scourge of Other Extortions

To permit the judgment of the instant case to stand would seriously encourage and subject every Hospital as well as other institutions and individuals to a scourge of extortions involving untold millions of dollars by unscrupulous Internal Revenue Agents. No one knows how much extortion now exists. At the time the shakedown incident took place in the instant case, the Chicago District Director of Internal Revenue, Sauber, was indicted. A former Commissioner of Internal Revenue served time in the Lewisburg Penitentiary. Former Chief Counsel of Internal Revenue, Caudel, was accused of corruption. Very recently, 15 agents were indicted in the New York district for bribe solicitation.

5. Petition To Investigate Fraud Practiced on the Court Was Ignored by the Tax Court

The "Petition For Court To Request U. S. Attorney General To Investigate Fraud Upon The Court" was ignored by the Tax Court. It was only "lodged" in that court and not otherwise acted on, as stated in the Court of Appeals decision from which the following is quoted (App. p. 1a):

> "Judge Withey concluded the tax court lacked jurisdiction either to grant or deny the petition, and ordered it 'lodged' with the tax court."

The "lodging" violated due process and equal protection under the Fourteenth Amendment.

6. Court of Appeals Held Petition Is Insufficient

The Court of Appeals erroneously held that the petition "* * * fails to allege fraud upon the Tax Court with sufficient particularity."

7. Fraud on the Court Is Gross, Brazen, Notorious and Shocking

The fraud practiced on the court, particularized in the petition is gross, brazen, notorious and shocking, participated in by petitioners' own attorneys, respondent, and by the abnegation of the Judges of their judicial functions and others.

8. Shakedown Attempt for $60,000

It was stated in the Petition (see printed "Brief and Appendix For Appellants," App. 6) that the Internal Revenue Agent Templer attempted a $60,000 shakedown, by making the following demand:

> "If you give me $60,000.00, I will leave you alone."

The shakedown attempt violated due process and equal protection under the Fourteenth Amendment.

9. John Potts Barnes Acted as Chief Counsel for Both Petitioners and Respondent at the Same Time

Attorney John Potts Barnes was engaged by petitioners who assured them that they owed no tax. Thereafter Barnes was also employed as Chief Counsel for the Internal Revenue Service and there processed the case personally against petitioners (see printed "Supplemental Appendix For Petitioners," pp. 1-18, filed in Court of Appeals, a copy of which

is part of the record here). The following is quoted from page 6, of the petition:

> "When John Potts Barnes first came on the case, he wrote a letter to the Commissioner stating that Kenner Hospital was indeed a non-profit institution. While he was still in the case, he was appointed Chief Counsel for the IRS in Washington, D. C., and then he wrote a letter * * * reversing his former letter, * * *.
>
> "John Potts Barnes demanded payments on the case, even though he was at the time a Government employee. During the trial in October, 1959, Mr. Barnes was asked if he had any records regarding the Kenner case. His answer was negative. Following this short session on the stand, the Court recessed and the Judge invited Mr. Barnes into his chambers."

Barnes' representation of petitioners was a sham and a fraud practiced on the court, and a violation of due process and equal protection under the Fourteenth Amendment.

10. Tax Court Judge Mulroney Abnegates Judicial Function

Some time after Judge Mulroney recessed the court to invite Barnes into his chambers, the Judge issued a decision (*Kenner* v. *C.I.R.*, 7th Cir. 1963, 318 F. 2d 632) (App. p. 7a) which "facts" stated therein are full of holes, like those in a sieve, and which took 22 pages in the petition to briefly describe (see printed "Brief and Appendix For Appellants," App. 4-26). We submit that no one could read the petition and not be struck by the abnegation of Judge Mulroney of his judicial function to respondent. The abnegation was in derogation to the due process and equal protection of the Fourteenth Amendment.

In 7 Moore's Fed. Prac., p. 510, it is stated as follows:

> "And while less obvious, an abnegation by the judge of his judicial function, although no actual fraud was perpetrated, may well be a 'legal' fraud by him upon the judicial institution. But Hazel-Atlas goes much further. In this case the court was not corrupted; and the extent to which the concocted article influenced the court was problematical. But granted that if the concoction and use of the article constituted fraud upon the court and hence relief should be granted without a determination that the judgment was the product of this fraud * * *"

11. Fraud Practiced on Court—Barnes Gets $5.107 Sham Fee

The intimidating conduct of John Potts Barnes with Judge Mulroney combined with the Judge's open, notorious, sarcastic, crushing and intimidating attitude toward witness Dr. Kenner, even beside the fact that Barnes was Chief Counsel for both parties at the same time, demanded and was paid a $5,107.50 "fee", in the middle of his tenure with the IRS, in March 1956, for such corrupt sham services rendered—all of which constitutes fraud practiced on the court, in violation to due process and equal protection clauses of the Fourteenth Amendment.

In 7 Moore's Fed. Prac., page 510, it is also stated that:

> "One point of difference, although not stressed by the Court in Hazel-Atlas, is that an attorney of Hartford was implicated in perpetrating the fraud. We believe that this is important, for an attorney is an officer of the Court. While he should represent his client with singular loyalty that loyalty does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest

dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court.

12. Facts Impose Upon Court Duty To Grant Petition

The foregoing facts not only justify the inquiry but impose upon the court to make it even if petitioners should not be willing to cooperate, to the end that the records of the court might be purged of fraud as was declared in *Hazel-Atlas* v. *Hartford,* 322 U.S. 238, 246, S. Ct. 997, 1001, as follows:

> "Indeed these facts not only justify the inquiry but impose upon us the duty to make it, even if no party to the original cause should be willing to cooperate, to the end that the records of the court might be purged of fraud, * * *"

When the foregoing facts and citations were brought to the attention of the Court of Appeals, it merely considered the abnegation of the judicial function of Judge "unwise". The following is quoted from the opinion:

> "* * * it was unwise for the judge to have a private conversation with Mr. Barnes under the circumstances, because of the possibility of giving rise to suspicions such as Dr. Kenner suggests. But Dr. Kenner's petition, considered either as a whole or in its several aspects, fails to allege fraud upon the tax court with sufficient particularity to entitle it to further consideration."

13. Court of Appeals Suppressed Additional Particulars of Fraud Practiced on the Court

Respondent suggested on page 35 of his "Brief For The Respondent" that petitioners supply or "reframe" their allegations of fraud which petitioners did not deem necessary; however, petitioners did move for leave

of court while at the same time submitting "Additional Affidavits Of Petitioners", containing the following pertinent and material affidavits, which unopposed motion was summarily denied without a hearing:

> Attorney Cass Practiced Fraud On The Court
>
> Abnegation Of The Trial Judge Of His Judicial Function
>
> "Attorney" Houston Practiced Fraud On The Court
>
> Attorney John Potts Barnes Practiced Fraud On The Court
>
> Solicitation Of $60,000 Bribe By Agent Templer In Lieu of $2,078,000 "Tax"

Petitioners have filed one printed copy of the foregoing mentioned, "Additional Affidavits Of Petitioners" as part of the record herein, which document was not certified by the Court of Appeals since it was "received" but not considered "filed".

The said unopposed motion was denied as follows:

> "On consideration of the motion of petitioner William H. Kenner, acting pro se, for leave to file additional affidavits, opposing counsel having filed no objections thereto,
>
> IT IS HEREBY ORDERED that the said motion for leave to file additional affidavits be, and the same is hereby denied."

The exclusion of the "Additional Affidavits of Petitioners" denied petitioners due process and equal protection guaranteed by the Fourteenth Amendment to the U. S. Constitution.

14. Suppression by Court of Appeals of Evidence of Fraud Is in Itself "Legal" Fraud on Court

The denial by the Court of Appeals to admit the additional affidavits was an abnegation of its judicial function and of itself "legal" fraud practiced upon the court, in direct violation of the decision of this Supreme Court, as quoted from *Hazel-Atlas, supra.*

15. Other Suppressed Evidence of Fraud Is in Hostile Exclusive Control of Respondent

In this case there are many more suppressed facts of fraud shrouded in secrecy. All efforts to unearth them have met with strong opposition, except as stated above in regard to the additional affidavits. Justice Brandeis correctly observed: "Sunlight is the most powerful of all disenfectants." Most of the corruption is still hidden below the surface.

Petitioners have shown injustice and fraud resulted from the attorneys who are officers of the courts and others. The Court should therefore not hesitate, much less hinder or suppress bringing respondent to his defense, as declared in *Chicago Title & Trust Co.* v. *Fox Theatres Corp.*, 182 F. Supp. 18 (SDNY), as follows:

> "This court will not shrink from putting respondents to their defense if it is shown that injustice or fraud resulted from the corruption of its officers."

16. Fraud on the Courts Should Not Be Condoned

Fraud upon the courts should not be condoned in the instant case.

The Court in *Hazel-Atlas, supra,* said:

> "But even if Hazel did not exercise the highest degree of diligence Hartford's fraud cannot be condoned."

17. Judgments Should Be Set Aside Irrespective of Merits of Claim

Where fraud upon the court is established, as here, the judgment should be vacated, irrespective of the merits of the claim, as decided in *Hazel-Atlas, supra,* quoted as follows:

> "Where fraud upon the court is established . . . His judgment should be set aside and his claim dismissed, irrespective of the merits of his claim."

The judgment denies petitioners due process and equal protection under the Fourteenth Amendment.

POINT II

PETITION SHOULD NOT HAVE BEEN DISMISSED. IF FOUND INSUFFICIENT, LEAVE SHOULD HAVE BEEN GRANTED TO AMEND. DISMISSAL VIOLATED DUE PROCESS AND EQUAL PROTECTING CLAUSES OF THE FOURTEENTH AMENDMENT TO CONSTITUTION OF THE U. S.

1. Petitioners Sufficiently Particularized Fraud Practiced on the Court

Petitioners have fully complied with Rule 9 (b) of the Fed. Rules of Civ. Proc. in that they have described, not only the particular fraud, but also the circumstances constituting fraud upon the courts with particularity. In *Noland Bros., Inc.* v. *U. S. for use of Fox Bros.,* 266 Fed. 2d 143, citing Rule 9 (b), it is stated on page 143, as follows:

> "* * * and Federal Rule does not require express allegation of 'fraud' but, instead, merely requires

> that the circumstances constituting fraud shall be pleaded with particularity. Fed. Rules Civ. Proc. rule 9 (b) 28 USCA."

Again, in *U. S.* v. *Gill,* D.C. Pa. (1957), 156 F. Supp. 955, it is stated:

> "* * * but all that is required is that the circumstances constituting the alleged fraud be pleaded with sufficient definiteness to advise the adversary of the claim which he must meet."

The dismissal denied petitioners due process and equal protection under the Fourteenth Amendment.

2. Even If Petition Is Insufficient It Should Be Amended, Not Dismissed

Even if allegations of fraud offended Rule 9(b) of the Fed. Rules of Civ. Proc., the pleading should be amended, not stricken or dismissed. In *Simmonds Aerocessories, Ltd.* v. *Elastic Stop Nut Corp.,* D.C.N.J. (1957), 154 F. Supp. 615, it was held that, "leave would be granted to amend". Respondent, in his "Brief For Respondent", suggested that, " * * * petitioners reframe their allegations of fraud * * * there is precedent for such action. *Chicago Title & Trust Co.* v. *Fox Theatres Corp.,* 182 F. Supp. 18 (S.D.N.Y.)." Petitioners were of the opinion that their petition was more than sufficient, but they did make an effort to file additional affidavits showing fraud, as stated above. The dismissal of the petition without permitting petitioners to amend violated the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the U. S.

CONCLUSION

For each of the reasons heretofore assigned, petitioners respectfully submit that the judgment must be reversed.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1967 SEPTEMBER SESSION, 1967

No. 16008

WILLIAM H. KENNER and ELEANOR V. KENNER, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

January 5, 1968

Petition for Review of Decision of the Tax Court of the United States

Before HASTINGS, *Chief Judge*, CASTLE and FAIRCHILD, *Circuit Judges*.

FAIRCHILD, *Circuit Judge*. William H. Kenner, present petitioner, suffered adverse decisions by the tax court, affirmed here.[1] On September 12, 1966, Dr. Kenner presented to Judge Withey of the tax court a document entitled "Petition for court to request U.S. Attorney General to investigate fraud upon the court". Judge Withey concluded the tax court lacked jurisdiction either to grant or deny the petition, and ordered it "lodged" with the tax court.

Dr. Kenner applied to this court for permission to appeal. We deemed the September 12 petition an application to set aside the previous decisions on the ground of fraud upon the tax court, the action of Judge Withey as dismissal for lack of jurisdiction, and the application for our permission to appeal as a petition to review, to be heard here in ordinary course.

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[1] *Kenner* v. *C.I.R.* (7th Cir. 1963), 318 F. 2d 632.

Two questions are presented: (1) Whether the tax court has power to vitiate its own decision, once it has become "final" under the terms of 26 U.S.C. sec. 7481. (2) If the tax court has such power, what disposition of this case ought we to make?

Dr.Kenner has appeared *pro se.* An assistant attorney general has appeared for the commissioner of internal revenue. On the first issue, counsel for the commissioner tells us; "Although the matter is not entirely free from doubt, it is the considered position of the Commissioner that the Tax Court, vested with a part of the judicial power of the United States, has the inherent power to undo that which has been obtained from it by fraud and that the 'finality' provisions of Section 7481 do not deprive it of that power expressly or by necessary implication".

On the second issue, the commissioner contends that the allegations made by Dr. Kenner do not add up to fraud upon the court, and that dismissal was justified, but the commissioner suggests that if this court believes that "petitioners, appearing pro se, should be given a second chance, *i.e.,* an opportunity to reframe their charges with the benefit of counsel, it is submitted that the Tax Court is the appropriate forum for that purpose".

Although the tax "court" is an independent agency in the executive branch[2] its powers and business are judicial in nature.[3] In some instances courts have been persuaded

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[2] 26 U.S.C. sec. 744.

[3] *Stern* v. *Commissioner of Internal Revenue* (3d Cir. 1954), 215 F. 2d 701, 707; *Reo Motors* v. *Commissioner of Internal Revenue* (6th Cir. 1955), 219 F. 2d 610, 612; *Fairmont Aluminum Co.* v. *Commissioner of Int. Rev.* (4th Cir. 1955), 222 F. 2d 622, 627; *Louisville Builders Supply Company* v. *C.I.R.* (6th Cir. 1961), 294 F. 2d 333, 339; *MacRae* v. *Riddell* (9th Cir. 1965), 350 F. 2d 291; *Maguire Industries* v. *United States* (Ct. of Cl., 1947), 88 F. Supp. 905; *Quinn* v. *Hook* (D.C.E.D., Pa. 1964), 231 F. Supp. 718, Aff'd 341 F. 2d 920.

that because the tax court's responsibilities are judicial, it must have powers which courts have, though not spelled out by Congress.

Congress has, however, very explicitly provided at what point a decision of the tax court shall become final. Finality accrues promptly after the exhaustion of the possibilities of direct review.[4] In the instant case, the decisions became final in 1963 upon the expiration of the time allowed for filing a petition for certiorari to review our decision affirming the decision of the tax court.

It has been settled that such finality precludes any subsequent reconsideration by the tax court, at least on such grounds as mistake, newly discovered evidence, and the like.[5] It has also been decided that where such finality is reached by lapse of the prescribed period after decision by the Supreme Court it precludes further consideration by the Supreme Court on application for rehearing.[6]

If any room has been left for a relaxation of the statutory finality in order to permit the tax court to consider whether its decision is the product of a fraud upon it, that is all that has been left. Even that possibility seems to have been rejected by the eighth circuit in deciding that the tax court does not have equitable jurisdiction to set aside a decision, once it has become final, even, apparently, where

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[4] 26 U.S.C. sec. 7481.

[5] *Lasky* v. *Commissioner of Internal Revenue* (9th Cir. 1956), 235 F. 2d 97, affirmed 352 U.S. 1027, 1 L. Ed. 2d 598, 77 S. Ct. 594; *Lentin* v. *Commissioner of Internal Revenue* (7th Cir. 1957), 243 F. 2d 907; *Quinn* v. *Hook* (D.C. E.D. Pa. 1964), 231 F. Supp. 718, aff'd 341 F. 2d 920; *Baglivo* v. *C.I.R.* (D.C.E.D. Pa. 1964), 235 F. Supp. 493.

[6] *Helvering* v. *Northern Coal Co.* (1934), 293 U.S. 191, 79 L. Ed. 281; *Simpson & Co.* v. *Commissioner of Int. Revenue* (1944), 321 U.S. 225, 88 L. Ed. 688; these were the two decisions cited in the per curiam order of the Supreme Court affirming *Lasky*.

fraud has been demonstrated.[7] We think, however, that it can be reasoned that a decision produced by fraud on the court is not in essence a decision at all, and never becomes final. It is most difficult to assume that Congress intended that a decision procured by fraud on the tax court could not be reached by any procedure in any tribunal, once the possibilities of direct review were exhausted. If a convincing case of palpable fraud on the court were presented, it is hard to justify a holding that it could not be considered. We conclude that the tax court has power to inquire into the integrity of its own decision even when such decision has become final and immutable in all other respects as a result of exhaustion of direct review or expiration of the time allowed for seeking review.

Disposition of the instant petition.

Dr. Kenner has made the broad assertion that the tax court decision "is tainted with fraud. The very temple of justice has been defiled with it". So general an assertion is not enough, and there is a heavy burden both of particularized pleading and of proof upon the one who seeks to impeach an order or decree of a court.[8] "There must be an offer to prove specific facts which will pretty plainly impugn the official record".[9] It "is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision".[10]

" 'Fraud upon the court' should, we believe, embrace only that species of fraud which does, or attempts to, defile

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[7] *Jefferson Loan Co.* v. *Commissioner of Internal Rev.* (8th Cir. 1957), 249 F. 2d 364, 367.

[8] *Chicago Title & Trust Co.* v. *Fox Theatres Corporation* (D.C.S.D.N.Y. 1960), 182 F. Supp. 18, 31.

[9] *United States* v. *Shaughnessy* (2d Cir. 1953), 206 F. 2d 897, 904, dissenting opinion.

[10] *England* v. *Doyle* (9th Cir. 1960), 281 F. 2d 304, 309.

the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication".[11]

With these standards in mind we have carefully examined Dr. Kenner's 24-page petition. It asserts that in a number of instances the decision of the tax court contained untrue statements as to matters of fact. These appear to be claims that some finding was not supported by evidence (in which event it could have been dealt with on review), or that the judge drew unfavorable inferences where the evidence presented a choice. No facts are suggested which would show that these errors, if they really are errors, were the result of some fraud upon the court.

The petition relates a number of incidents in which Dr. Kenner felt that agents of internal revenue service acted improperly or showed animus toward him. One agent, according to Dr. Kenner, solicited a bribe, although later investigation was said to clear the agent. Even assuming, however, that the agents were hostile or had an attitude of unfairness toward Dr. Kenner, the petition leaves us completely in the dark as to how the agents fraudulently induced the court to decide against Dr. Kenner. We suspect that Dr. Kenner may have proceeded upon the unfounded assumption that the acts of the agents of the internal revenue service are chargeable to the tax court.

The petition indicates that in Dr. Kenner's opinion several of his attorneys failed to represent his interests vigorously, and took steps which he feels were prejudicial to him. Here again he has failed to describe any fraud practiced upon the tax court.

One incident is worthy of specific mention. It appears that Dr. Kenner retained attorney John Potts Barnes, then in private tax practice, to represent him in dealings with

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[11] 7 Moore's Federal Practice, 2d ed., p. 512, ¶ 60.23.

the internal revenue service. Later, Barnes became chief counsel of the internal revenue service, and took positions in that capacity which were in conflict with positions taken while representing Dr. Kenner. It is true that Barnes may have done no more as chief counsel than sign letters or papers prepared by others. We think, however, than an attorney in this type of situation should scrupulously avoid even the appearance of representation of the second client in a matter on which he has represented the first. But even assuming impropriety in his conduct as counsel the facts alleged do not indicate that there was fraud on the tax court.

Dr. Kenner alleged further: "During the trial [before the court] Mr. Barnes was asked if he had any records regarding the Kenner case. His answer was negative. Following this short session on the stand, the Court recessed and the Judge invited Mr. Barnes into his chambers. . . . The Judge called John Potts Barnes into his chamber after John Potts Barnes finished his testimony on the stand—Judge Mulroney asked John Potts Barnes to his chambers, which shows that the Judge was biased".

If this occurred as alleged, it was unwise for the judge to have a private conversation with Mr. Barnes under the circumstances, because of the possibility of giving rise to suspicions such as Dr. Kenner suggests. But Dr. Kenner's petition, considered either as a whole or in its several aspects, fails to allege fraud upon the tax court with sufficient particularity to entitle it to further consideration.

We are of the opinion that the tax court had the power to consider a claim that fraud had been perpetrated on it even after the decision became final, but the present petition lacks sufficient substance. The tax court's dismissal of the petition is

AFFIRMED.

Order Dated February 14, 1968

IT IS ORDERED by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.

(318 F. 2d 632)

WILLIAM H. KENNER, William H. Kenner and Eleanor V. Kenner and Kenner's Charitable Hospital, Inc.,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

U.S. Court of Appeals, Seventh Circuit,
No. 13806, June 4, 1963.

On Petition for Review of Decisions of the Tax Court of the United States.

Before SCHNACKENBERG, SWYGERT, Circuit Judges, and PLATT, District Judge.

SWYGERT, Circuit Judge:

This petition for review is brought by William H. Kenner, his wife Eleanor V. Kenner, and Kenner's Charitable Hospital, Inc., which Dr. Kenner founded and operated. Relief is sought from decisions of the Tax Court redetermining deficiencies in income tax and additions to tax for the years 1944 through 1954 in the total amount of $592,862.90 in respect to the Hospital and deficiencies in income tax and additions to tax for the years 1945 through 1954 in the total amount of $337,739.87 in respect to Kenner.[1]

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[1] Eleanor V. Kenner is involved only by reason of having filed joint tax returns with her husband for the years 1948 through 1953.

Because of the extensive number of transactions involved, their complexity, and the length of the findings of fact and opinion filed by the Tax Court, reference to those documents is made. They are reported at 20 CCH Tax Ct. Mem. 185 [¶ 61,037 P-H Memo TC] (1961).

A short summary of the facts as found by the Tax Court is sufficient for our purposes since an examination of the underlying evidentiary facts and factual inferences on which the determinations of that court were based convinces us that the court's ultimate findings are not clearly erroneous. Commissioner v. Duberstein, 363 U.S. 278 [5 AFTR 2d 1626] (1960).

William H. Kenner is a medical doctor. In 1932, Kenner purchased a building at 716 Wellington Avenue in Chicago, where he had been engaged in private practice. The building was purchased for about $1,000 cash and the assumption of an $8,000 mortgage. One year later, Kenner's Charitable Hospital, Inc., was organized and incorporated under the laws of the State of Illinois. Although the membership of the Hospital board of directors changed from time to time, Kenner was in complete and effective charge of it during all the years of its existence. The Hospital was solely a Kenner family organization. When the Hospital began to function in 1934, Kenner purchased a nearby nurses' home for $1,000 cash and the assumption of an $8,000 mortgage. Both the hospital building and the nurses' home were deeded to the Hospital corporation in 1936.

The Hospital's articles of incorporation, which were amended from time to time, generally provided that its purpose was to provide free, charitable hospital rooms and treatment and not to operate for pecuniary profit. In 1949, after the Hospital had further amended its articles of incorporation, it was approved under the Illinois General Not For Profit Corporation Act.

In the years prior to 1944, Kenner purchased six farms in northern Illinois, and he took an active part in their

operation and management. Two bank accounts were maintained by Kenner in his own name in banks in Woodstock and Huntley, towns in Illinois near which some of Kenner's farms were located.

Between 1944 and 1950, two bank accounts were maintained by the Hospital in Chicago banks: in the Aetna State Bank for the period January 1, 1944, to December 10, 1947, and in the City National Bank from December 14, 1946, until sometime in 1950. From some time prior to 1944, Kenner indiscriminately commingled his own personal funds and the funds of the Hospital in the latter's bank accounts. No systematic records of any sort were kept by the Hospital until 1949. Although Kenner deposited the proceeds of personal loans, income from his medical practice, and farm receipts not only in his own bank accounts but also in those of the Hospital, the only deposits in the Hospital's bank accounts which can be traced as personal funds of Kenner are $5,253.33 deposited in 1944 and $25,786.98 deposited in 1946.[2]

In 1946, the Hospital sold its old premises and the nurses' home for $60,000 and $15,000, respectively, and a new building was acquired for $155,000. Kenner immediately began to convert the premises into a hospital. The Chicago City Council changed the zoning of the location to permit the operation of a hospital with a capacity of about 65 beds.

The income of the Hospital for the years 1944 through 1947 was determined primarily through the use of the net-worth method. For the years 1948 through 1954, the Hospital's income was determined by using financial statements prepared by the Hospital's bookkeepers. It was stipulated that Kenner withdrew from the Hospital's bank account $75,563.54 in 1947, $60,876.21 in 1948, $49,292.94 in

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[2] Petitioner Kenner urges otherwise, but speculation and conjecture by the taxpayer after the fact hardly constitute sufficient credible evidence upon which the Commissioner may rely in determining deficiencies.

1949, and $6,686.96 in 1950, and that these amounts were used by Kenner to pay his personal and farm expenses. For the years 1949 through 1954, the income of the Hospital was further diverted to Kenner by payment of his liquor bills, gasoline bills, other farm expenses, and expenses of Kenner's personal residence.

Kenner contends that the sums of money withdrawn from the Hospital's bank accounts for personal uses at all times were less than the amounts deposited by him from non-Hospital sources. We are convinced that the record amply supports the Tax Court's refusal to find that the withdrawals by Kenner from the Hospital accounts were limited to funds which he had previously loaned the Hospital. There were no accounting records submitted that tended to prove that bank loans made by Kenner were used, as he contends, to defray Hospital operating expenses and pay for Hospital capital expenditures. Rather, the evidence supports the conclusion, implicit in the Tax Court's findings, that these bank loans were merely devices by which Kenner used the Hospital's bank accounts to drain off hospital funds to pay his personal expenses. No credible evidence was submitted to show that it was Kenner rather than the Hospital who repaid Kenner's bank loans.

We think that the evidence fully supports the Tax Court's finding that "[d]uring the years in question prior to 1950, checks on these [the Hospital's] bank accounts, admittedly in the total sum of at least $230,000 went for the payment of Kenner's farm, personal, and living expenses." We also think the evidence falls short of establishing that no part of the Hospital's net earnings inured to the benefit of Kenner during any of the years in question.

Beginning in 1950, after the Hospital maintained a segregated bank account and had installed an accounting system, Kenner began to use Hospital funds to acquire property in Arizona. A total of $292,873.22 of the Hospital's funds was diverted by Kenner during the years 1950 through

1954; $100,977.75 in 1950, $25,366.33 in 1951, $27,583.20 in 1952, $58,823.06 in 1954, and $80,122.88 in 1955.

Shortly after Kenner formed the Altar Land and Cattle Company in the spring of 1950, Altar purchased the Royal Hotel and El Sahurao Apartments in Tucson, Arizona, and the Lazy-V Ranch, which was about 25 miles from Tucson. The hotel and apartments cost 140,000 and the ranch $85,000. In 1953, Kenner purchased for $43,750 the Hill House property, 10.8 acres which had been excepted from the original purchase of the Lazy-V. Hospital funds were used in the acquisition of each of these properties and for their operation and improvement.

Kenner testified that the improvements, repairs, and other expenditures on the Arizona properties were preparatory to construction of a sanitarium. The sanitarium never came into existence, if indeed it was ever contemplated, and again we find nothing in the record sufficient to induce us to set aside the findings of the Tax Court that the properties were operated as investment properties for the profit of Kenner and the Altar Land and Cattle Company.

Altar sold the Royal Hotel and El Sahurao Apartments in December, 1951, for $135,000. During the time these properties were owned by Altar, they were operated by a resident manager hired by Kenner. Altar reported gross income from rents of $13,750 on its 1951 income tax return.

That portion of the Lazy-V known as the Hill House property was conveyed by Kenner to a trustee in 1954, subject to the instructions of the beneficiaries (principally Kenner and family). The fact that it was subsequently conveyed in 1957 to the Hospital might have supported Kenner's Hospital-benefit theory except for the fact that this latter transfer took place after the initiation of a tax investigation. We believe the record supports the Tax Court's determination that the Hospital funds expended

for the Arizona properties during the years 1950 through 1954 were expended for Kenner's benefit and are properly chargeable to him as income during those years.

We think it clear that the factual determinations of the Tax Court are fully supported by the record. Certainly they are not clearly erroneous. The detailed treatment accorded the many transactions bear out that court's ultimate findings. Kenner's arguments before this court constitute an attempt to have us sit in judgment of his credibility and his memory since there is little else to support his contentions. The Tax Court had the benefit of demeanor testimony. The evidence and the inferences to be drawn from it would make it difficult for a trier of the facts to believe Kenner's version of his financial relationship with the Hospital including his testimony that he acquired the Arizona properties for the construction of a sanitarium to be owned ultimately by the Hospital. The burden was upon the Hospital and Kenner to prove to the Tax Court that the Commissioner's determinations were incorrect. Helvering v. Taylor, 293 U.S. 507 [14 AFTR 1194] (1935). It is evident their proof fell far short of that. Helvering v. Nat. Grocery Co., 304 U.S. 282 [20 AFTR 1269] (1938).

This appeal requires us to treat one more of petitioners' contentions. Kenner's Charitable Hospital, Inc., argues that Sections 3813(a)(5) and 3813(b) of the 1950 Amendment to the Internal Revenue Code of 1939 and Sections 503(a) and 503(b)(5) of the Internal Revenue Code of 1954 shield it from liability for taxes despite the fact that the Commissioner and the Tax Court found that for each year in question the Hospital was unable to sustain its burden of proof that no part of its net earnings inured to the benefit of Kenner.

The legislation in question defined specific "Prohibited Transactions," which, if engaged in by organizations described in Section 101(6), 26 U.S.C. 1952 ed., § 101(6), of the 1939 Code, or its successor Section 501(c)(3), 26 U.S.C.

1958 ed., § 501(c)(3), of the 1954 Code,[3] would cause them to lose their tax exemption. The prohibited transactions are: (1) lending income or corpus without adequate interest or security; (2) payment of excessive compensation for personal services; (3) making services available on a preferential basis; (4) purchasing property for more than adequate consideration; (5) selling securities or other property for less than adequate consideration; (6) engaging in any other transaction substantially diverting income or corpus, in dealings with (1) the creator or substantial donor of the organization, or (2) any member of the family of such creator or donor, or (3) any corporation controlled by such creator or donor.[4]

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[3] For our purposes Section 101(6) of the 1939 Code and Section 501(c)(3) of the 1954 Code are similar.

Section 501 reads:

Exemption From Tax On Corporation, Certain Trusts, Etc.

(a) Exemption From Taxation.—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502, 503, or 504.

* * * * * * *

(c) List of Exempt Organizations.—The following organizations are referred to in subsection (a):

* * * * * * *

(3) Corporations, . . . organized and operated exclusively for . . . charitable, . . . purposes. . . . *no part of the net earnings of which inures to the benefit of any private shareholder or individual,* . . . (Emphasis supplied).

[4] Section 3813 of the 1939 Code and Section 503 of the 1954 Code, for our purposes are substantially similar.

Section 503 reads in part:

Section 503. Requirements For Exemption.

(a) Denial of Exemption to Organizations Engaged in Prohibited Transactions.—

(1) General rule.—An organization described in section 501(c)(3) which is subject to the provisions of this section shall not be exempt from taxation under section 501(a) if it has engaged

The Hospital argues that since it was excepted from the provisions of Section 3813 of the 1939 Code and Section 503 of the 1954 Code, it automatically falls outside the "inurement of benefit test" of Section 101(6) of the 1939 Code and Section 501(c)(3) of the 1954 Code. This argument could succeed only if we accept the proposition that Congress intended to replace the provisions of the "inurement of benefit" qualification in Section 501(c)(3) as the first step toward achieving tax exempt status for charitable hospitals. If Congress desired to do this it used an extremely inappropriate means to accomplish its purpose. Section 503 and its predecessor in the 1939 Code specifically mention that their terms are to apply to those organizations described in Section 501, so Congress was well aware of the 'inurement of benefit" test of that section. We believe that the exception of hospitals from the additional prohibited transactions in Section 503 of the 1954 Code was not intended to relieve hospitals from the more basic provisions of Section 501, which includes the "inurement" test.

The Hospital filed an exemption affidavit on August 26, 1949, which represented, among other things, that no part of its net earnings inured to the benefit of any private shareholder or individual. On the basis of these repre-

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in a prohibited transaction after July 1, 1950; and an organization described in section 401(a) which is subject to the provisions of this section shall not be exempt from taxation under section 501(a) if it has engaged in a prohibited transaction after March 1, 1954.

* * * * * * *

(b) Organizations to Which Section Applies.—This section shall apply to any organization described in section 501(c)(3) or section 401(a) except—

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(5) an organization the principal purposes or functions of which are the providing of medical or hospital care or medical education or medical research or agricultural research.

* * * * * * *

sentations, a ruling of tax-exempt status was issued by the Commissioner by letter dated October 10, 1949. Following an investigation, this ruling was revoked by the Commissioner in a letter dated September 11, 1951. Section 3791 (b) of the 1939 Code provides, in effect that rulings shall be revoked retroactively unless the Secretary of the Treasury or the Commissioner provide otherwise. The retroactive revocation of rulings obtained through misrepresentations of fact does not constitute an abuse of administrative discretion. Birmingham Business College, Inc. v. Commissioner, 276 F.2d 476 [5 AFTR 2d 1175] (5th Cir., 1960).

Petitioners failed to carry their burden of proof in any respect. The Hospital failed to prove that it was entitled to exempt status since portions of its net income inured to the benefit of Kenner.

The decisions of the Tax Court are affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

WILLIAM H. KENNER, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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COMMISSIONER OF INTERNAL REVENUE

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

On September 10, 1966, William H. Kenner, appearing *pro se* on behalf of himself, his wife, and Kenner's Charitable Hospital, Inc., filed a sworn petition with the Tax Court praying that the court request that the Attorney General undertake an investigation of fraud allegedly practiced upon that court. The proceedings allegedly tainted by fraud had culminated in a decision[1] that had become "final" more than three years earlier, by virtue of Section

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[1] *Kenner* v. *Commissioner*, 20 T.C.M. 185 (1961), affirmed, 318 F. 2d 632 (C.A. 7, 1963) (Pet. App. 1a).

7481(2)(A) of the Internal Revenue Code of 1954. In the request for an investigation, petitioners recited many factual errors said to have been committed by the Tax Court in the 1961 proceeding and charged that the proceeding itself was the product of a corrupt and illicit conspiracy on the part of Internal Revenue agents and petitioners' own attorneys (Pet. App. 5a). The Tax Court directed that the petition be "lodged" with it, stating that it lacked jurisdiction to act upon it. Treating petitioners' application for an investigation as a motion to set aside the final order of the Tax Court in the 1961 proceeding, and deeming the action of the Tax Court in "lodging" the request as a dismissal for lack of jurisdiction, the court of appeals granted petitioners' request for permission to appeal. (Pet. App. 1a.)

After the case had been fully briefed, the court held, as the Commissioner urged, that the Tax Court has jurisdiction to inquire into the integrity of its otherwise "final" decisions where circumstances demonstrate palpable fraud on the court (Pet. App. 4a). The court of appeals ruled, however, that the circumstances averred did not with adequate particularity suggest that fraud had been practiced on the Tax Court in connection with the 1961 proceeding (Pet. App. 5a). Accordingly, it affirmed the Tax Court's "dismissal" of the petition.

ARGUMENT

The decision below is correct. There is no conflict of decisions or any other reason warranting review by this Court.

1. Rule 9(b), F.R. Civ. P., expresses the traditional standard that in any averment of fraud, the circumstances believed to constitute the fraud must be alleged with particularity. Where the type of fraud charged is fraud upon the court,[2] a particularly strict standard of specificity is demanded. Reliance upon general allegations of fraud and corruption, or the repetitious characterizations of the conduct of a responsible official in those terms, will not satisfy this stringent standard. *Chicago Title & Trust Co.* v. *Fox Theatres Corp.*, 182 F. Supp. 18 (S.D. N.Y.).

Moreover, to raise an issue of fraud upon the court, the allegations must relate directly to the integrity of the decision sought to be set aside, and not merely to matters *inter partes*. See 7 Moore's *Federal Practice* (2d ed.), Sec. 60.33. Although such leading fraud-on-the-court decisions as *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238, and *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514 (C.A. 3), certiorari denied *sub nom. Universal Oil Products Co.* v. *William Whitman Co.*, 335 U.S. 812, stand squarely for the proposition that a court may inquire

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[2] Fraud on the court has been defined as the product of an unconscionable scheme or plot to influence improperly a decision of the court (*England* v. *Doyle*, 281 F. 2d 304 (C.A. 9)) or as an attack on the institution of the court itself so that it cannot adjudicate impartially (*Martina Theatre Corp.* v. *Schine Chain Theatres, Inc.*, 278 F. 2d 798 (C.A. 2)). Examples include bribery of a court official, employment of counsel to exert improper influence on the court, abnegation by a judge of his judicial function, and involvement of an attorney in the fraud of his client or another by suborning their perjury.

into the integrity of even its "final" judgments, none suggests that a full-scale hearing is required in the absence of sufficient allegations indicating that such fraud has taken place. *Chicago Title & Trust Co.* v. *Fox Theatres Corp.*, *supra*, p. 38.

2. Tested by these principles, the decision of the court below is correct. Quite apart from recognizable deficiencies in pleading,[3] petitioners' attempts to taint the 1961 proceedings with fraud was correctly rejected because they failed to supply any causal nexus between the misconduct charged and the integrity of the judicial decision rendered. Specifically, the alleged $60,000 bribe is said to have been solicited in 1950, at the investigatory stage of the tax controversy. In the complete absence of any suggestion as to how this incident could have tainted with fraud the proceedings in the Tax Court eleven years later, the court below was justified in rejecting (Pet. App. 5a) petitioners' apparent, but unfounded, assumption that such acts of Internal Revenue agents would be chargeable to the Tax Court. Similarly, petitioners' allegations that their onetime counsel, John Potts Barnes, wrote a letter as Chief Counsel reversing the position he had taken when representing petitioners, collected a "sham" fee from them after becoming employed as Chief Counsel for the Internal Revenue Service, and visited with the Tax Court judge in chambers—even

[3] It is not enough to allege, without more, that "the judge was bribed" (*United States* v. *Shaughnessy*, 206 F. 2d 897, 904 (C.A. 2) (dissenting opinion)), nor is the requisite degree of specificity attained by attributing unlawful consequences to otherwise lawful conduct (*Chicago Title & Trust*, *supra*, p. 37).

if true[4]—would not constitute irregularities of sufficient import to impugn the integrity of the Tax Court decision. Thus, disposition of the petition for an investigation, without a hearing on the factual basis for the allegations, was proper.

3. Petitioners alternatively urge (Pet. 19-20) that, if their petition was insufficient, the court of appeals violated the Fourteenth Amendment by failing to grant them leave to amend it. There is, however, no provision for amendment as of right at the appellate stage of litigation. Rule 17, Rules of Practice, Tax Court of the United States (Rev. 1958, 1965 ed.); Rule 15, Federal Rules of Civil Procedure. To be sure, the discretion of a trial court in permitting amend-

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[4] The letter petitioners claim was written by Barnes as Chief Counsel has never been found to exist. The only documents in the record bearing Barnes' name are certain pleadings in the Tax Court; these bear his name because he was Chief Counsel. The court of appeals, in discussing the allegations against Barnes, apparently assumed that he had signed documents prepared by others in connection with the original case against the petitioner (Pet. App. 6a). A more likely assumption would have been that in accordance with I.R.S. practice, the signing of Barnes' name was the routine act of a subordinate in Regional Counsel's Office in Chicago, proceeding under a general delegation of authority.

In addition, we think it appropriate to add that the Department of Justice has been informed that the Inspection Division of the Internal Revenue Service, which reports directly to the Commissioner, investigated both the alleged bribe offer and the charges against Barnes in 1958. It concluded that the $60,000 "bribe" offer was, in reality, a written compromise proposal presented to petitioner to set his tax liability at $60,542.85 for the years 1944-1948. Mr. Barnes was also cleared of any impropriety in accepting a fee while Chief Counsel for professional work done for the petitioners prior to his appointment.

ment to a pleading may, in the interests of justice, be liberally invoked, especially in *pro se* proceedings; but such a request calls for the exercise of discretion that should not be overturned unless abused. In the absence of some showing in the court of appeals that amendment would cure the deficiencies, that court acted properly in not permitting it and in not remanding the case to the Tax Court for further consideration. See 3 Moore's *Federal Practice* (2d ed.), Sec. 15.08(4).[5]

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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Solicitor General.

RICHARD C. PUGH,
Acting Assistant Attorney General.

GILBERT E. ANDREWS,
ROBERT J. CAMPBELL,
Attorneys.

AUGUST 1968.

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[5] Leave to amend was granted in *Chicago Title & Trust Co., supra,* but that case involved extraordinary circumstances. Judge Manton had been convicted of dishonest judicial conduct in other matters and an unsavory atmosphere pervaded the entire receivership involved.

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No. 281

In the Supreme Court of the United States

OCTOBER TERM, 1968

WILLIAM H. KENNER,
ESTATE OF ELEANOR V. KENNER, Deceased, and
KENNER'S CHARITABLE HOSPITAL, INC., a not-for-profit, Illinois corporation,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondents.

REPLY TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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REPLY ARGUMENT

In reply to respondent's Argument, petitioners state that the decision of the court below is incorrect. There is a clear head-on conflict of decisions warranting review by this Court.

1. In specific reply to item 1 of respondent's Argument (Res. 2, 3, 4), petitioners state the following:

The authorities cited by respondent (Res. 3, 4) are the same as some of those excellent authorities cited by peti-

tioners (Pet. 3, 4, 5, 16, 18, 19), such as *Hazel-Atlas Co.* v. *Hartford Co.*, 322 US 238; *Root Refining Co.*, v. *Universal Oil Products Co.*, 169 F. 2d 514 (C.A. 3), 7 Moore's Federal Practice (2d ed) 510, Sec. 60.33; *Chicago Title & Trust Co.* v. *Fox Theatres Corp.*, 182 F. Supp. 18 (S.D.N.Y.); and Rule 9 (b), Fed. Rules Civ. Proc. Petitioners agree with the definition of fraud practiced on the court as stated in note 2, in respondent's Argument (Res. 3, n.2). All of these authorities support petitioners' case, on all fours. It is most obvious that petitioners have met the standards of specificity of particularity required.

It should be noted, however, that respondent has conveniently ignored the case cited by petitioners (Pet. 19) of *Noland Bros., Inc.* v. *U. S. for use of Fox Bros.*, 266 Fed. 2d 143, citing Rule 9 (b), on page 143, as follows:

> "* * * and Federal Rule does not require express allegation of 'fraud' but, instead, merely requires that the circumstances constituting fraud shall be pleaded with particularity. Fed. Rules Civ. Prac. rule 9 (b) 28 USCA."

Respondent has also completely ignored another case, cited by petitioners, regarding the requirements of Rule 9 (b) (Pet. 20), the citation of *U. S.* v. *Gill*, D. C. Pa. (1957), 156 F. Supp. 955, where it was held as follows:

> "* * * but all that is required is that the circumstances constituting the alleged fraud be pleaded with sufficient definiteness to advise the adversary of the claim which he must meet."

Furthermore, it should be noted that respondent has been significantly silent about petitioners' charge of *conspiracy* to practice a fraud on the court, which silence is tantamount to admission thereof. Such conspiracy has been thoroughly established by particularized related facts

and circumstances and clearly apparent when viewed either separately or together. In *U. S.* v. *Glasser,* C.C.A. Ill., 116 F. 2d 690, 691, it was held that:

> "A '*conspiracy*' is usually established by a number of apparently disconnected circumstances which when taken together throw light on whether the accused have an understanding and are in common agreement." (Emphasis supplied)

The record herein is manifestly replete with basic particularized facts in support of petitioners' allegations of fraud practiced on the court. Any ordinary prudent person could not help but fully conclude, without any doubt in his mind, that petitioners were relieved of their property with a value in excess of $2,078,000, by a poorly concealed conspiracy of deceit and fraud practiced upon the court. Petitioners have shown the formation of a conspiracy, connecting their own attorneys, respondent, and the court with it; the performance of acts by them in furtherance thereof; damage to petitioners as a consequence of such action; and the intent to damage petitioners.

It has been established by uncontroverted facts that the conspirators have defiled the Temple Of Justice by debauching the power of adjudication, with disdain and impunity.

In light of the foregoing facts it is idle for respondent to belabor its fantasy that there is no "causal nexus between the misconduct charged and the integrity of the judicial decision rendered." (Res. 4)

Petitioners' original petition in the Tax Court, which was appealed to the U. S. Court of Appeals and which is at issue here, charged an "*unconscionable corrupt con-*

spiracy'' over an extended period of about 18 years to practice a fraud upon the court to shake-down petitioners for $60,000 by Internal Revenue Agent George Templer and because petitioners did not pay the $60,000, but instead, reported the attempted extortion, the petitioners' property was confiscated without any pretext of due process or equal protection of the law or any court action. The conspiracy is particularized in the 24 page petition ''lodged'' in the Tax Court. Among other particulars, it discloses a chain of overt acts to accomplish the conspiratorial purpose; how George Templer attempted the extortion; that the then Regional Director of the IRS, Mr. Sauber, was indicted for fraud; how Chief Counsel for petitioners, John Potts Barnes, practiced a fraud on the court by also acting as Chief Counsel for the Internal Revenue Service, for which he demanded and received a $5,107.50 ''fee'' from petitioners, in addition to a salary from the Internal Revenue Service; how Joe Rae and his attorney, Klipstine, participated in purloining petitioners' $2,000,000 real estate for the paltry sum of $750,000 by making an insignificant down payment, the balance of which remains still unpaid even though the present is many years later; that petitioners' ''attorneys'', Warren L. Schmidt and James F. Slager, signed a corrupt ''Agreed Order'', purportedly liabling petitioners for about one-half million dollars tax which they do not owe; and the obvious abnegation of Tax Court Judge Mulroney who abnegated his judicial function.

The foregoing facts firmly establish that the court has been defiled as the product of an unconscionable scheme or plot to influence improperly the decision of the court, there was an attack on the institution of the court itself so that it could not adjudicate impartially. Attorneys Klipstine and John Potts Barnes were employed to exert

improper influence on the court; petitioners' own "attorneys" were involved in the fraud of their clients, all of which falls squarely within the definition of fraud upon the court supplied by respondent (Res. 3, n 2).

2. In specific reply to item 2 of respondent's Argument (Res. 4), petitioners represent to the Court as follows:

Tested by all of the foregoing principles, the decision of the court below is clearly erroneous. In light of the conspiracy that started in 1950, and has not yet abated, no additional "causal nexus" (Res. 4) is necessary "between the misconduct charged and the integrity of the judicial decision rendered." The said petition, here in issue, relates a chain of overt progressive illegal acts, constituting the corrupt conspiracy from its inception in 1950 to the rendering of the decision and subsequent thereto. It is therefore futile for respondent to erroneously contend that there is a "complete absence of any suggestion as to how this incident could have tainted with fraud the proceedings in the Tax Court eleven years later" (Res. 4).

The misbehavior of John Potts was unconscionable; he was Chief Counsel for both petitioners and respondent, at the same time; he personally and actively processed the case against petitioners and during which process, on one occasion, he personally confronted petitioners in the Internal Revenue Building, Washington, D. C., at a scheduled hearing on the case.

The conspiracy is obviously a barrel of corruption. John Potts Barnes is part of it; he has contributed heavily to it, and the indulgence by respondent in a rank form of sophistry, to twist the truth, to change or convert, as if by magic, the documented indisputable substantial material

particularized facts of fraud practiced on the court by Barnes does not tend, in the slightest, to absolve him of his misbehavior and make him smell like a rose.

He testified in the Tax Court before Judge Mulroney, where the Judge's immediate attitude toward petitioner, William H. Kenner, was highly sarcastic, oppressive, suppressive and intimidating; whereas, the Judge's attitude toward John Potts Barnes, on the contrary, was to the other extreme—overly friendly, who recessed the court immediately upon Barnes being excused as a witness, to visit with him in Chambers. Such unrefuted illegal overt acts of the Judge clearly indicate that the Judge abnegated his judicial function.

At this late date, it is too late to claim, *for the first time,* that, "The letter petitioners claim was written by Barnes as Chief Counsel has never been found to exist" (Res. 5, n 4).

In light of Barnes' having served as Chief Counsel for both petitioners and for the IRS, at the same time, and having personally appeared at a hearing to process the case, it is to no avail for respondent to now argue that. " • • • the signing of Barnes' name was the routine act of a subordinate in Regional Counsel's Office in Chicago, • • •"

It is likewise too late now, *for the first time,* to allege, "that the Department of Justice has been informed that the Inspection Division of the Internal Revenue Service, which reports directly to the Commissioner, investigated both the alleged bribe offer and charges against Barnes in 1958" (Res. 5, n 4). Furthermore, just because the Department of Justice was allegedly "informed" does not clothe the allegation with credence.

It is also significant to note that, *for the first time,* in respondent's "Brief For The Respondent", in the U. S. Court of Appeals, 7 Cir., *Kenner* v. *Commissioner,* No. 16,008, which is the case on appeal here, respondent has offered the belated alibi that:

> "It concluded that the $60,000 'bribe' offer was, in reality, a written compromise proposal presented to petitioner to set his tax liability at $60,542.85 for the years 1944-1948. Mr. Barnes was also cleared of any impropriety in accepting a fee while Chief Counsel for professional work done for the petitioners prior to his appointment" (Res. 5, n 4).

Since the foregoing quotation appeared in said brief, filed on 6-5-67, petitioners have not been successful in obtaining a copy of the alleged "written compromise", all of which indicates that the "written compromise" is nothing more than a belated rash fabrication to alibi an attempted extortion, the first link in the corrupt conspiracy to practice a fraud upon the court.

The only "professional work done" was the letter written by Barnes to respondent that petitioners owe no tax, and thereafter another letter reversing the position taken in the first letter. Of course, Barnes processed the case against petitioners which, no doubt, in reality, constitutes the "professional work done".

3. In specific reply to item 3 of respondent's Argument (Res. 5, 6), petitioners represent to the Court as follows:

Respondent erroneously states that the court below acted properly in not permitting petitioners to amend, as follows:

> "In the absence of showing * * * that amendment would cure the deficiencies, * * *"

Such showing was made as indicated by the following paragraph quoted from page 19 of Reply Brief For Petitioners, in the U. S. Court of Appeals:

> " 'The last paragraph of Respondent's Brief, page 35, suggests additional specifics of fraud at this phase of the litigation, which petitioners feel is not necessary in light of a preponderance of evidence already presented but, because of the suggestion, and if the court deems it necessary, petitioners move for leave of Court to submit "Additional Affidavits, tendered herewith."

In addition to the foregoing, petitioners made a formal motion for leave of court to file said affidavits, which motion was denied even though respondent had informed the court that it had no objection to the motion.

The Additional Affidavits, received by the court on July 19, 1967, but not considered filed, contained the following particularized facts of fraud practiced on the court:

Attorney Cass Practiced Fraud On The Court, p. 2.

Abnegation Of The Trial Judge Of His Judicial Function, p. 4.

"Attorney" Houston Practiced Fraud On The Court, p. 6.

Attorney John Potts Barnes Practiced Fraud On The Court, p. 7.

Solicitation Of $60,000 Bribe By Agent Templer In Lieu of $2,078,000 "Tax", p. 9.

In the U. S. Court of Appeals, in Brief For The Respondent, p. 35, respondent stated that there is precedent to amend pleadings and cited *Chicago Title & Trust Co. v. Fox Theatres Corp., supra,* however, in respondent's instant Argument (Res. 6, n 5), a contrary stance is taken,

this time declaring that the Chicago Title case does not apply because "an unsavory atmosphere prevaded". On the contrary, that case is in point since in the instant case there also prevades an unsavory atmosphere; yet there is a striking difference in the Chicago Title case, where neither the government nor the courts suppressed a mass of evidence of fraud practiced on the court, as was done in the Tax Court and in the U. S. Court of Appeals, in the instant case.

It is shocking and incredible that the courts suppress such a glaring, scandalous and huge corrupt mass of fraud practiced on the court, instead of purging it promptly from its records; the Tax Court even refused to order respondent to produce its pertinent records of corruption of which respondent has exclusive hostile control; the courts also denied an investigation!

The Tax Court erroneously claimed that it had no jurisdiction to purge its records of fraud practiced on the court.

The Court of Appeals held that the Tax Court does have jurisdiction but, that the obvious huge mass of corrupt fraud practiced on the court, brought to its attention, does not add up to fraud practiced on the court.

Such a decision is clearly erroneous and incredible!

4. It should be noted that respondent did not controvert the following items of great moment stressed in the Petition For A Writ Of Certiorari, which items should therefore be considered admitted by respondent:

Summary Of Argument, paragraph 1 (Pet. 7)

1. The Bludgeoning of Petitioners (Pet. 8)

2. Death and Destruction of Petitioners (Pet. 9)

3. Sinister Machinations of Corrupt Officials Is "Standard Practice" According to Respondent (Pet. 9)

4. Existing Judgment Encourages a Scourge of Other Extortions (Pet. 12)

5. Petition To Investigate Fraud Practiced on the Court Was Ignored by the Tax Court (Pet. 12)

7. Fraud on the Court Is Gross, Brazen, Notorious and Shocking (Pet. 13)

9. John Potts Barnes Acted As Chief Counsel for Both Petitioners and Respondent at the Same Time (Pet. 13)

10. Tax Court Judge Mulroney Abnegated Judicial Function (Pet. 14)

11. Fraud Practiced on Court—Barnes Gets $5,107 Sham Fee (Pet. 15)

12. Facts Impose Upon Court Duty To Grant Petition (Pet. 16)

13. Court of Appeals Suppressed Additional Particulars of Fraud Practiced on the Court (Pet. 16)

14. Suppression by Court of Appeals of Evidence of Fraud Is in Itself "Legal" Fraud on Court (Pet. 18)

15. Other Suppressed Evidence of Fraud Is in Hostile Exclusive Control of Respondent (Pet. 18)

16. Fraud on the Courts Should Not Be Condoned

17. Judgments Should Be Set Aside Irrespective of Merits of Claim (Pet. 19)

If the evidence of fraud particularized in the case at bar does not add up to fraud practiced on the court, no evidence ever did.

If any case ever required an investigation, this one surely does.

The Tax Court decision to "lodge" the Petition, and the U. S. Court of Appeals' decision to affirm the Tax Court, grounded on nothing but the $60,000 shake-down extortion attempt, and on Barnes' notorious work on both sides of the street, should be purged from the court record, forthwith.

Respectfully submitted,

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SUPREME COURT, U. S.

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Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondents.

MOTION FOR RECONSIDERATION

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vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondents.

MOTION FOR RECONSIDERATION

Come now petitioners, Kenner Charitable Hospital, Inc., a not for profit, Illinois corporation, estate of Eleanor V. Kenner, deceased, and William H. Kenner, and move this Honorable Court for a reconsideration of its denial on October 14, 1968 of Petition of Writ of Certiorari, on the following grounds:

1. The pathetic plight in which the judgment has placed Kenner's Charitable Hospital, Inc., a not for profit, Illinois corporation and its other two victims has terrifying implications to not only them but also to every taxpayer and prospective taxpayer of the United States. It is a reflec-

tion on the integrity of the bench and bar, on the Government itself and of great moment to this Honorable Court.

2. The fraud practiced on the Court by John Potts Barnes, the former Chief Counsel for both petitioners and the Commissioner (at the same time) and others, has terrifying also, implications. The visible effects of this calamity indicates the destruction it has already wrought with the end nowhere in sight.

3. The denial of the writ has dropped the administration of justice a notch, from the nearly incredible to the wholly chaotic.

4. Where else is a law abiding taxpayer to go for relief from a manifestly corrupt judgment than to this Honorable Court? What happens to society when it is undermined by the very sources that are set up to guard the foundation?

5. This case is not about to be swept under the rug by respondent; it has interested, embittered and outraged too many citizens for such a quiet end. It can not be done. It is a somber prospect, but the innocent victims in the case at bar are not facing it alone.

6. Respondent, together with John Potts Barnes and other co-conspirators, are crowding the dark path that leads to anarchy in one direction or to tyranny in another.

WHEREFORE, petitioners earnestly pray that this Honorable Court will reconsider its denial of the writ.

Respectfully submitted,

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